Bank Kerjasama Rakyat Malaysia Bhd v Tetuan Haranay, Roni & Anikah & Ors

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–704 OF 1998
CLEMENT SKINNER JC
16 DECEMBER 1998

Evidence *— Documentary evidence — Extrinsic evidence — Defendants introduced extrinsic evidence to contradict terms of a written document — Contrary to ss 91 and 92 of Evidence Act 1950 — Whether extrinsic evidence must be ignored in construing terms of undertaking*

Legal Profession *— Liability as officer of court — Breach of undertaking — Solicitors' undertaking — Solicitors disputing liability in undertaking — Whether undertaking was unconditional — Whether dispute raised as to enforceability of undertaking*

The defendants had, in their capacity as solicitors for one Ahmad Padli, written to the plaintiff, requesting the plaintiff not to proceed further with the auction of the goods of Ahmad Padli and gave to the plaintiff an undertaking to pay the sum of RM26,000 within six months from the date of the letter. However, the defendants had failed to honour their undertaking. Hence this application.

The defendants opposed this application and in doing so filed an affidavit ('Abdul Roni's affidavit') in opposition. Paragraph 6 of Abdul Roni's affidavit explained the circumstances in which the undertaking was given. Based on Abdul Roni's affidavit, counsel for the defendants raised two grounds to oppose the plaintiff's application, namely that: (i) the undertaking was in fact a conditional one as it was given upon an agreement or assurance of the plaintiff's credit officer that it would not be enforced until Ahmad Padli received his commission from sale of a piece of land; and (ii) the allegation in para 6 of Abdul Roni's affidavit had not been denied, refuted or replied to by the plaintiff by reason whereof the plaintiff must be taken as accepting the allegation and if so, there is clearly a dispute as to the enforceability of the undertaking. Counsel for the plaintiff, in reply to the first ground, submitted that the court should not look outside the document or import extrinsic evidence to contradict the very clear and unambiguous terms of the undertaking.

Held, allowing the application:

The defendants' attempt was contrary to the provisions of ss 91 and 92 of the Evidence Act 1950, where s 91 excludes extrinsic evidence from being adduced in proof of the terms of a document except the document itself and s 92 of which prohibits the admission of extrinsic evidence by the parties to contradict the terms of a document. In construing the terms of the undertaking, evidence of the alleged 'agreement' with the credit officer of the plaintiff must be ignored as such evidence was to be excluded and remained inadmissible under the provisions of ss 91 and 92 of the Evidence Act 1950. It followed that the undertaking was unconditional in terms.

Since extrinsic evidence regarding the 'agreement' of the credit officer was to be excluded and was indmissible, the averments in para 6 of Abdul Roni's affidavit could not be relied upon by the defendants as raising any dispute (see pp 203H–I and 204B–C); *United Malayan Banking Corp Bhd v Tan Liang Kong & Ors* [1990] 1 MLJ 280 followed.

[Bahasa Malaysia summary

Defendan-defendan, dalam keupayaan mereka sebagai peguamcara untuk seorang yang bernama Ahmad Padli, telah menulis kepada plaintif, meminta plaintif supaya tidak meneruskan lelong barangan Ahmad Padli dan telah memberikan akujanji kepada plaintif untuk membayar jumlah sebanyak RM26,000 dalam tempoh enam bulan daripada tarikh surat tersebut. Namun demikian, defendan-defendan telah gagal menepati akujanji mereka. Oleh yang demikian permohonan ini dibuat.

Defendan-defendan menentang permohonan ini dan dalam membuat demikian, telah memfailkan afidavit ('afidavit Abdul Roni') sebagai tentangan. Perenggan 6 afidavit Abdul Roni menjelaskan keadaan di mana akujanji tersebut telah diberikan. Berdasarkan afidavit Abdul Roni, peguam defendan-defendan menimbulkan dua alasan bagi menentang permohonan plaintif, iaitu bahawa: (i) akujanji tersebut sebenarnya adalah bersyarat kerana ia telah diberikan atas suatu persetujuan atau jaminan pegawai kredit plaintif bahawa ia tidak akan dikuatkuasakan sehingga Ahmad Padli menerima komisyennya daripada jualan sebidang tanah; dan (ii) pengataan dalam perenggan 6 afidavit Abdul Roni telah tidak dinafikan, disangkal atau dibalas oleh plaintif yang mana plaintif mesti dianggap telah menerima pengataan tersebut dan andainya begitu, maka jelas terdapat pertikaian atas penguatkuasaan akujanji tersebut. Peguam plaintif, sebagai membalas alasan pertama, menghujahkan bahawa mahkamah tidak harus melihat apa yang di luar dokumen atu mengimport keterangan ekstrinsik bagi menyangkal terma akujanji tersebut yang amat jelas.

Diputuskan, membenarkan permohonan:

Percubaan defendan-defendan adalah bercanggahan dengan peruntukan ss 91 dan 92 Akta Keterangan 1950, di mana s 91 mengecualikan keterangan ekstrinsik daripada dikemukakan sebagai bukti terma suatu dokumen kecuali dokumen itu sendiri dan s 92 yang melarang penerimaan keterangan ekstrinsik oleh pihak-pihak untuk menyangkal terma suatu dokumen. Dalam mentafsir terma akujanji tersebut, keterangan mengenai 'perjanjian' yang dikatakan dengan pegawai kredit plaintif mestilah diabaikan kerana keterangan sedemikian hendaklah dikecualikan dan tetap tidak boleh diterima di bawah peruntukan ss 91 dan 92 Akta Keterangan 1950. Ini bermakna bahawa terma akujanji tersebut adalah tanpa syarat.

Memandangkan keterangan ekstrinsik mengenai 'perjanjian' pegawai kredit hendaklah dikecualikan dan tidak boleh diterima, penegasan dalam perenggan 6 afidavit Abdul Roni tidak boleh digunakan oleh defendan-defendan sebagai menimbulkan apa-apa pertikaian (lihat ms 203H–I dan 204B–C); *United Malayan Banking Corp Bhd v Tan Liang Kong & Ors* [1990] 1 MLJ 280 diikut.]

Notes

For a case on extrinsic evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 736.

For cases on breach of undertaking by solicitor, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1464–1472.

Cases referred to

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)

Tunku Ismail bin Tunku Mohd Jewa & Anor v Tetuan Hisham, Sobri & Kadir [1989] 2 MLJ 489 (refd)

United Malayan Banking Corp Bhd v Tan Lian Keng & Ors [1990] 1 MLJ 280 (folld)

Legislation referred to

Evidence Act 1950 ss 91, 92

Pardeep Singh (*Choong Yik Son & Fiona Ghaus*) for the plaintiff.

Abdul Roni bin Abd Rahman (*Haranay Roni & Anikah*) for the defendants.

Cur Adv Vult

Clement Skinner JC: This is an application by the plaintiff to enforce a solicitors undertaking against the second, third and fourth defendants, as partners in the first defendant legal firm of Messrs Haranay, Roni & Anikah ('the firm'), to pay the plaintiff the sum of RM26,000 within 24 hours of being so ordered.

The facts giving rise to this application are as follows.

On 26 August 1996, the plaintiff, a bank, obtained judgment against three persons in the Ipoh Magistrate's Court in the sum of RM24,352 together with interest thereon at 8.8%pa from 8 May 1996 till date of judgment and thereafter at 8%pa till date of payment. One of the persons against whom judgment was obtained is a person called Ahmad Padli bin Md Yosp ('Ahmad Padli'). In execution of its judgment, the plaintiff on 13 January 1997 obtained a writ of seizure and sale which was on 31 January 1997 levied against the goods of Ahmad Padli and the goods thereby seized were ordered by the Kuala Kangsar Magistrate's Court was to be sold by public auction on 14 March 1997.

Following such seizure, Ahmad Padli made a representation to the plaintiff and obtained a postponement of the sale to 31 March 1997 and subsequently to 5 May 1997. However, on Ahmad Padli's failure to settle his outstanding debt, the plaintiff through their solicitors obtained an order from the Kuala Kangsar Magistrate's Court to hold an auction on 28 August 1997 which also did not take place as a result of intervention by the first defendant legal firm of Haranay, Roni & Anikah on behalf of Ahmad Padli.

On 5 September 1997, the legal firm, as solicitors for Ahmad Padli, wrote to the plaintiff requesting the plaintiff not to proceed further with the auction and giving to the plaintiff an undertaking to pay the sum of RM26,000 within six months from the date of the letter. Since the terms in which this letter is written are relevant to this application, I set it out in full:

> 5 September 1997
>
> The Manager,
> Bank Kerjasama Rakyat Malaysia Bhd,
> No 41, 43 & 45, Medan Gopeng 1,
> Jalan Gopeng,
> 30750 Ipoh,
> Perak.
>
> Dear Sir,
>
> Re: Ipoh Magistrate's Court Summons No 72–1473–96
> Bank Kerjasama Rakyat Malaysia Bhd v Ahmad Padli bin Md Yosp
> Kuala Kangsar Magistrate's Court AE No 76–1–97
>
> We act for En Ahmad Padli bin Md Yosp (NRIC No T 410853) of Kampung Suak Petai, 33800 Manong, Kuala Kangsar, Perak.
>
> We have been informed by our clients that judgment was entered against him on 26 August 1996 for the sum of RM24,352 together with costs and interest accruing thereon until date of full satisfaction.
>
> Further, our client informed us that a writ of seizure and sale has been issued against him and the same was executed at premises known as Kampong Suak Petai, 33800 Manong, Kuala Kangsar.
>
> We hereby give you our express and unqualified undertaking to pay you the sum of RM26,000 within six months from the date of this letter hereof in satisfaction of the judgment debt owing by our client.
>
> In the premises, kindly do not proceed further with the auction of the movable properties seized.
>
> Yours faithfully,

The defendants have failed to honour their undertaking despite a demand from the plaintiff's solicitors dated 22 April 1998. Hence this application.

The defendants oppose it and in doing so have filed an affidavit in opposition affirmed on 10 January 1998 by Abdul Roni bin Abd Rahman ('Abdul Roni's affidavit'), the third defendant and a partner of the firm. Paragraph 6 of Abdul Roni's affidavit explains the circumstances in which

A the undertaking was given. It was alleged therein that Ahmad Padli had on 17 July 1997 arranged to sell a piece of land through the firm. From this transaction, Ahmad Padli was expected to receive RM26,706.25 as commission. The third defendant therefore personally spoke to the plaintiff's credit officer, one Abdul Aziz, explaining the above. It was alleged that the plaintiff's credit officer would only agree to postpone the auction B scheduled for 28 August 1998 on condition the plaintiff received from the firm an unconditional undertaking despite the third defendant making it clear that he was only willing to give an undertaking which was conditional on the commission being received by Ahmad Padli. Notwithstanding the third defendant's abovestated stand, the credit officer insisted on receiving an unconditional undertaking but agreed that it would not be acted upon C until Ahmad Padli had received his commission. In reliance on the assurance, the defendants allegedly issued their unconditional undertaking.

Based on what is stated above, learned counsel for the defendants in submissions raised two grounds to oppose the plaintiff's application:

D (1) The undertaking, although unconditional in terms, was in fact a conditional one, as it was given upon an agreement or assurance of the plaintiff's credit officer that it would not be enforced until Ahmad Padli received his commission.

(2) The above allegation which was made in para 6 of Abdul Roni's affidavit has not been denied, refuted or replied to by the plaintiff by E reason whereof the plaintiff must be taken as accepting the allegation and if so, there is clearly a dispute as to the enforceability of the undertaking.

In reply to the first ground, learned counsel for the plaintiff states that this court, in deciding whether or not the letter of undertaking is conditional or F unconditional, should restrict itself to looking at the document itself and the words found therein. On doing this, it will be seen that no mention is made of any conversation between the credit officer and Abdul Roni nor to any commission payable to Ahmad Padli. The undertaking is clearly expressed in unconditional terms. In effect, what learned counsel for the plaintiff G submits is that the court should not look outside the document or import extrinsic evidence to contradict the very clear and unambiguous terms of the undertaking. I find there is merit in this submission because what the defendants have sought to do by para 6 of Abdul Roni's affidavit is to introduce extrinsic evidence about the 'agreement' of the plaintiff's credit officer not to act on the undertaking so as to contradict the terms of a H written document. The defendants' attempt is contrary to the provisions of ss 91 and 92 of the Evidence Act 1950, whereby s 91 excludes extrinsic evidence from being adduced in proof of the terms of a document except the document itself and s 92 of which prohibits the admission of extrinsic evidence by the parties thereto, to, inter alia, contradict the terms of a document. In the case of *United Malayan Banking Corp Bhd v Tan Lian* I *Keng & Ors* [1990] 1 MLJ 280, Edgar Joseph Jr J (as his Lordship then was), in dealing with a case in which a party thereto tried to introduce extrinsic evidence to contradict the terms of a guarantee and indemnity,

sounded a caution that where from time to time an attempt is made to adduce evidence of negotiation on the grounds that it is part of the 'matrix of fact', the temptation to do so ought to be resisted. I intend to do just that in this case by holding that in construing the terms of the undertaking, I must ignore evidence of the alleged 'agreement' with the credit officer of the plaintiff as such evidence is to be excluded and remains inadmissible under the provisions of ss 91 and 92 of the Evidence Act 1950. I accordingly hold that the undertaking is unconditional in terms.

With regard to the second ground raised by the defendants, in view of my above finding that extrinsic evidence regarding the 'agreement' of the credit officer is to be excluded and is inadmissible, the averments in para 6 of Abdul Roni's affidavit cannot be relied upon by the defendants as raising any dispute. However, if I am wrong in my earlier finding and the averments in para 6 are not to be excluded but considered by this court, I do not think that every allegation or statement in an affidavit must be accepted by the court uncritically and without reservation as to the truth of such statement. The very statement relied upon may on closer scrutiny afford reasons for not accepting or giving any credence to it, so that a failure to respond or reply to it will not as a matter of course give rise to a dispute of fact. In the case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at p 217, Lord Diplock delivering the opinion of the Privy Council stated:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be ... . It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

Bearing in mind what is stated above, when what is stated in para 6 of Abdul Roni's affidavit is considered fully, it shows that the third defendant tried to give a conditional undertaking, the condition being the receipt by Ahmad Padli of his commission. However, the plaintiff's credit officer insisted on an unconditional undertaking. If that is so, it is highly improbable that the credit officer would then agree not to enforce the undertaking until Ahmad Padli received his commission. To do so would in effect mean the credit officer was agreeable to a practically unenforceable undertaking because so long as Ahmad Padli had not received his commission for whatever reason, the undertaking could not be enforced. And, if that be the case, then it would be in Ahmad Padli's interest never to receive the commission. To believe that the credit officer would agree to such a condition is inherently improbable.

For the above reasons, I find that the averment regarding the credit officer's 'agreement' put forward in para 6 of Abdul Roni's affidavit is not sufficiently plausible to raise any dispute which needs to be determined or resolved at a trial. In the result, I find that this is a proper case in which the

court can exercise its summary jurisdiction to enforce the defendants' undertaking. The undertaking is clear and unconditional in terms. It is for the payment of a specified amount by an ascertained date.

In the case of *Tungku Ismail bin Tunku Mohd Jewa & Anor v Tetuan Hisham, Sobri & Kadir* [1989] 2 MLJ 489, Wan Adnan J (as his Lordship then was) in dealing with a case also involving the enforcement of a solicitor's undertaking, held that the summary jurisdiction to enforce a solicitor's undertaking should only be exercised in a clear case. In so holding, his Lordship, at p 492, referred to the case of *Silver & Drake v Baines* [1971] 1 QB 396 where Lord Denning MR said:

> This court has from time immemorial exercised a summary jurisdiction over solicitors. They are officers of the court and are answerable to the court for anything that goes wrong in the execution of their office. Even if the solicitor has been guilty of no fault personally but it is the fault of his clerk, he is accountable for it. This jurisdiction extends so far that if a solicitor gives an undertaking in his capacity as a solicitor the court may order him straightaway to perform his undertaking. It need not be an undertaking to the court. Nor need it be given in connection with legal proceedings. It may be a simple undertaking to pay money, provided always it is given 'in his capacity as a solicitor'. If such an undertaking is given, the court may summarily make an order on the solicitor to fulfil his undertaking ... . This summary jurisdiction means, however, that the solicitor is deprived of the advantages which ordinarily avail a defendant on a trial. There are no pleadings; no discovery; and no oral evidence, save by leave. The jurisdiction should, therefore, only be exercised in a clear case.

Having considered fully the facts and evidence before me, I am satisfied that this is a clear case for the court to order the enforcement of the defendants' undertaking given as solicitors to the plaintiff. I accordingly allow the plaintiff's application in the terms of the originating summons and costs.

Application allowed.

Reported by Mohd Rizal Abidin